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VIRGINIA LAW REGISTER

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Unreasonable Interference with the Liberty of the Citizen.

The United States District Court of California has held in Yan Gee *v.* San Francisco, 235 Fed. 757 that the San Francisco ordinance prohibiting laundries from working between 6 P. M. and 7 A. M. is unreasonable interference with the liberty of the citizen in the prosecution of a lawful occupation and having no real or substantial relation to the purpose ostensibly sought to be accomplished. The Court said:—

"Very clearly, if this provision of the ordinance be a valid exercise of the police power, it is difficult to foresee the point at which we should be enabled to say that the limit of the legislative power of the municipality has been reached. If such a restriction upon the right of the individual to prosecute a legitimate industry be reasonable under the facts disclosed in this bill, could it be said that a further restriction to ten, eight, or even a less number of hours, would be less so? And the history of laundry regulation in San Francisco, as disclosed in the numerous cases arising therefrom, renders this no idle question It is perhaps no exaggeration to say that this business has afforded a greater field for so-called police regulation than all other classes of business combined, and apparently with a progressive tendency to constantly impose increased restrictions thereon. From an original requirement forbidding work in laundries during the period of eight hours in the night time in certain limited districts we find the period later increased to eleven hours, and it is now, by the present measure, sought to further increase this period of enforced idleness for thirteen hours throughout the entire city, upon the theory that the public good demands it. I think we may aply quote the language of the

Supreme Court in Lochner *v.* New York, (198 U. S. 45,) where, with reference to the kindred regulation there under consideration, it is said:

'It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power, for the purpose of protecting the public health or welfare, are in reality passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law.

It will be remembered that the Supreme Court of the United States has held that an ordinance of this character prohibiting the working of women in laundries between certain hours was clearly constitutional and a proper exercise of the police power of the State. Miller *v.* Wilson, 236 U. S. 373. The same rule was laid down as to female employees in a hospital. Bosley *v.* McLaughlin, 236 U. S., p. 285. These decisions along with the decision in Muller *v.* Oregon, 208 U. S. 412, were based upon considerations relating to women's physical structure, her maternal functions and the vital importance of preserving the strength and vigor of the race, and legislation designed for her protection, the court said, can be sustained, even when, like legislation is not necessary for men and could not be sustained.

This language would seem to indicate that if this case ever reaches the Supreme Court of the United States the decision will be sustained.

Attractive Nuisances.

The much disputed Turn-Table decisions have taken a new phase in the case of Hibberd *v.* Wichita (Kan.), in which the plaintiff, a child of four years of age, sought to recover damages for an injury sustained by being bitten by a coyote in the defendant's park.

The defendant was a municipal corporation and contended that in the maintenance of the park and zoo it was acting in the

exercise of a purely governmental function and was not liable for the negligence of those in charge of the animals. This contention was overruled in the lower court and a judgment entered for the plaintiff, but on appeal the judgment below was reversed, it being held that a city by the maintenance of a zoological garden in a public park is not liable in damages for injuries inflicted on visitors by animals therein through the negligence of the city's officers or agents in not properly confining the animals. In a dissenting opinion West J., said:

The coyote cage was a most malignant and excuseless attractive nuisance. While the maintenance of a public park may be a governmental function, still, as we said in Murphy *v.* Fairmont Township, 89 Kan. 760, 765, 133 Pac. 169, quoting from the Iowa Supreme Court, "The creation and maintenance of a nuisance is very clearly not a governmental function, and the authorities are practically of one voice on the subject." The maintenance of a public park does not imply and should not include the provision of man-eating specimens of zoology to dine upon the children of those who visit the park.

It seems to us Judge West's dissenting opinion ought to have been the law in this case, for the principle on which the Turn-Table cases have been decided is that the turn-table is a useful and lawful machine affixed to the owner's real estate and incapable of doing any manner of harm to any person off the land. It is a necessity, not unsightly, not obstructive nor offensive in any sense. Nobody can be injured by it unless he comes upon the land and set the machine in motion himself to his own injury.

Certainly this cannot be said of the coyote. He was put in cage by the municipality for the purpose of being seen, especially by children, in order that they might, whilst amusing themselves with the sight of the animals, learn something of zoology and the nature of wild beasts. It was, therefore, the duty of the municipality to exercise the greatest care to see that this naturally dangerous animal was confined so that he could not injure any person, more especially one of tender years; failing that it ought to be responsible for any injury produced by their lack of care.

Right to Send Conscript Army beyond American Soil—War Powers.

The writer has several times lately heard men of supposed intelligence and patriotism question the constitutional authority of the American Government to send the conscript army to fight beyond the confines of the United States. They readily agreed that Volunteers or the Regular Army may be sent anywhere but maintained that the Government can not so use drafted men against their will. Must our country wait until the helmeted legions of the Kaiser invade our fair land before using the force of the conscript army to oppose them? Traitors and abettors of treason will everywhere answer "yes," but a solemn accord of voices rising from the graves of the founders of the Constitution will answer "no."

The Constitution directly grants the power "to declare war" "to raise and support armies," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Does the Constitution, when it authorizes war to be made, mean war or something else? Does it mean war only on this continent or does it mean war on any continent? Surely it means war anywhere in the world, and so construed it means that our armies, however raised, can be sent to wage war wherever it may be necessary.

The writer can not do better than to quote from two cases, one from the North and one from the South, decided in the days that tried men's souls and when brother fought brother in our now common country. In *McCormick* v. *Humphrey*, 27 Ind. 144, 154, the court said: "When Congress declares war, by that declaration it puts in force the laws of war, and the war powers of the government, which are not to be exercised, under the constitution, in time of peace, now come into full force, by virtue of the constitution, and are to be exerted by the President and Congress. After the declaration of war, every act done in carrying on the war, is an act done by virtue of the constitution, which authorized the war to be commenced. Every measure of Congress, and every executive act performed by the President, intended and calculated to carry the war to a successful issue, are acts done under the constitution." And as was said in *Parker* v. *Kaughman*, 34 Ga. 136, 142: "It must not be forgotten, that

Governments, however free in theory and in practice, have their parts to act in the grand drama of international affairs. They must hold intercourse, and maintain relations, with all other governments, whether free or despotic. They may have controversies—wars, with the most absolute and potent. When this issue comes, there is no necromancy in Republicanism to spirit away the invader—no magic spell, to resolve into friendliness his hostile purpose. It is an issue of force, and the Republic must put forth man for man, gun for gun—must match strength with strength. It is concession enough to Liberty, that with us, even in such crises, the power is wielded by no usurping or hereditary despot, according to his caprice, but by chosen Representatives of the people, in accordance with the principles and usages of free Governments. Still, it must be real power, power over the citizen, which he may not resist; else, over-sensitive republicans, aspiring to independence of their own government, may be enslaved by another. We can not suppose, that either the framers of our Constitution, or the people who adopted it, preferred to leave the liberties and the sovereignty of the country at the mercy of foreign potentates, rather than invest the public councils with the power of defending them; that they dreaded foreign conquest, less than domestic rule. Let us realize, at once, that war is an abnormal condition of society; and that where it obtains, whatever be the form of the Government, the status of the citizen or the subject, is more or less modified to meet its demands. The citizen is transmuted into the soldier, and the soldier is, ex necessitate rei, subjected to arbitrary rule, such as the citizen knew not before. The freeman's consolation is, that every sacrifice, whether of personal ease or freedom of action, of property, of health, or of life, is an offering on the altar of liberty."

"Inter arma legis silent—in the time of war the law is silent." This old maxim is as much applicable when war is waged by a democracy as when it is waged by an autocracy. In war the supreme efforts of a nation and its utmost endeavors must be put forth, and therefore war powers are transcendantly greater than all other powers. There is a power upon which the constitution stands and which rises above the constitution. It is the great power of self-preservation which applies to nations and states as well as to individuals. It is older than our Government and

arises in the very necessity of the existence of government. The nation can well afford to suspend the enjoyment by the individual of his right to remain in this country, for a season, in order that by the preservation of its own existence, it may secure many other rights unabridged to the whole people forever.

When the life of the republic is imperiled, he mistakes his duty and obligation as a patriot who is not willing to concede to the constitution such a capacity of adaption to circumstances as may be necessary to meet a great emergency, and save the nation from hopeless ruin. The pages of history tell us that our liberties can not survive if we do not put forth every effort in this supreme crisis of our existence as a nation. This is the voice of wisdom from all the ages; it speaks to us from the tombs of many republics, once happy and proud, and confident of perpetuity. It should not be forgotten that our country is in great danger and that the crisis demands of every American a hearty support of all proper means for the successful waging of this war in order that we may have an honorable and a victorious peace which will save us and our posterity throughout all the future from the fear of tyrannical domination by an autocratic government such as Germany has proved herself to be.

We may be of a different political faith from the President, and he may not be the man of our choice; his policies and the measures of his administration may not be such as we can at all times approve; but these are minor considerations, and can not free us from the paramount obligation of lending every aid for the salvation of our beloved country. We should all feel that no hardship we may be called on to endure as the result of this war, is comparable with the success of our enemies, and the horrors which will follow from such a catastrophe.

B. S.

Exemption from Military Service—Persons with Dependents.

Under the Selective Service Act of May 18, 1917, and the Presidential Rules and Regulations formulated thereunder, certain classes of persons are entitled to exemption therefrom, including those with persons dependent on them for support which renders their exclusion or discharge advisable. Dependents in-

clude wife and children, widowed mother, aged and infirm parents, and orphan brothers and sisters under a specified age. The greatest difficulty facing the Local Exemption Boards is to determine when one really has persons dependent upon him for support. In some sections of the country all of the married men and a large percentage of single men have filed claims for exemption upon such ground. If all these claims are allowed, it is easily seen that the Government will have great difficulty in raising an army. So Provost Marshall General Crowder has called attention to the multitude of these claims, and has issued a warning that if too many of such claims are allowed, or this provision for exemption is abused, it will be withdrawn altogether. It is clear that it has been abused in many instances, and many prosecutions have been begun against those who have falsely sworn to fraudulent claims. At least one case has arisen in the city of Richmond where it was discovered that the husband of a wife whose income from her property amounts to five thousand dollars annually had filed a claim for exemption on the ground that she was entirely dependent upon him for support. The husband, the wife and the third person, the head of a family whose affidavit of the justness of the claim is necessary, have all been arrested on the same warrant. Others should take warning from this case and be careful not to violate the provisions of the Selective Service Act as well as those of the Federal Criminal Code relating to false swearing.

Under late instructions the Provost Marshall General has laid down the following instances when married men shall not be exempted: (1) When his wife's parents will consent to care for her during her husband s absence; (2) where she has an income sufficient to maintain her; and (3) where the husband's employer will continue the payment of his wages or a part of them, which together with his pay as a soldier, will be sufficient to care for his wife and family during his stay in the army.

Upon being asked for his opinion by one of the Local Boards the writer gave it as his view that the proper ruling would be that a person having dependents is not exempt where his pay as a soldier would be sufficient to support such dependents. And it is understood that such will be the ruling of other Local Boards. It can easily be seen that those who in civil life make

$30 or less will be in as good a position pecuniarily if not better to care for their dependents when called to the colors than when at home as the government furnishes them with clothes and subsistence, and $25 a month can easily be sent to such dependents leaving the soldier $5 a month for such small things as he may need. Besides in case the soldier is killed his dependents will receive 6 months pay and the proceeds from the insurance which the government will place on his life.

The power to withdraw a provision for exemption on any particular ground is clear. It has been held that exemptions contained in draft laws may be revoked by subsequent legislation, (*Com.* v. *Bird,* 12 Mass. 443) as they are merely personal privileges and are not contracts made with the government (*Com.* v. *Rogers* (Pa.), 2 Pittsburgh 377). No government can have the right to endanger the life of the nation it represents, by contracting that it will not exercise the powers confided to it. For a proposition so obviously true it can hardly be necessary to cite authority; but the authorities are ample to show that in less important matters than that of military defense, a legislative body can not part with its powers, by any proceeding, so as not to be able to continue the exercise of them, and if any attempt be made to do so the act is null and void.

As said in *Burroughs* v. *Peyton,* 16 Grat. (Va.) 470, 471: "Exemption from future liability on the part of a citizen to render military service at the call of the country, is not a subject matter of contract, within the meaning of the clause of the constitution prohibiting the passage of any law impairing the obligation of contracts. By the term 'contracts' in that clause it is not meant to include rights and interests growing out of measures of public policy. Acts in reference to such measures are to be regarded as rather in the nature of legislation than of compact, and although rights or interests may have been acquired under them, those rights and interests can not be considered as violated by subsequent legislative changes which may destroy them. Whatever in the nature of a contract could be considered to exist, there must be implied in it a condition that the power is reserved to the legislature to change the law thereafter as the public interest may from time to time appear to require."

B. S.